

SIERRA CLUB, UTAH CHAPTER

IBLA 91-16

Decided September 13, 1991

Appeal from a decision of the Utah State Director, Bureau of Land Management, approving a record of decision and final environmental impact statement granting temporary rights-of-way and partially approving an exchange of public lands. UTU 64200.

Dismissed in part, affirmed in part, vacated in part, and remanded.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM has no authority to approve a proposed partial exchange independent of review of the non-Federal lands to be acquired.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way

BLM's decision approving proposed temporary rights-of-way pending consummation of an exchange is properly vacated in part when it provides no term in the event the exchange is not consummated.

APPEARANCES: Cindy King, Salt Lake City, Utah, for the Utah Chapter, Sierra Club; Patrick J. Garver, Esq., and Kenneth R. Barrett, Esq., Salt Lake City, Utah, for U.S. Pollution Control, Inc.; and David K. Grayson, Esq., Office of the Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Utah Chapter, Sierra Club (Sierra Club or appellant) has appealed a September 5, 1990, record of decision (ROD) and final environmental impact statement (FEIS) of the Utah State Director, Bureau of Land Management (BLM), approving the granting of temporary rights-of-way to U.S. Pollution Control, Inc. (USPCI). 1/ BLM's ROD states:

---

1/ Appeals were also filed by the City of Wendover, Utah, and the Utah Wildlife Federation. The Utah Wildlife Federation appeal was dismissed for lack of standing and the City of Wendover withdrew its appeal.

Following review of the USPCI Clive Incinerator EIS and public comments of record, it is deemed in the public interest to grant rights-of-way for access and utilities across certain public lands in Tooele County, Utah, to allow for the construction of an industrial and hazardous waste incinerator at the Clive site. It is also deemed in the public interest to allow for the disposal of certain public lands by exchange.

(ROD at 6). The decision granted rights-of-way for a temporary access road, temporary railroad spur, power transmission line, a well and access road, a water pipeline, and a telephone line (ROD at 1).

The ROD specifically states that a final decision on the land exchange will be made at some future date, but appellant alleges that the September 5, 1990, decision is, in fact, an exchange decision. On the lands proposed to be conveyed out of Federal ownership by exchange, USPCI proposes construction of road, utility, and rail access to USPCI's toxic, hazardous, nonhazardous industrial, and medical waste incineration site located in the West Desert Hazardous Industry Area. This facility is referred to as the "Clive Incinerator Site." The ROD refers to an FEIS that analyzes "the environmental impacts of the proposed transfer, storage, and incineration facility, and the transportation and utility corridors through construction, operation, and closure" (FEIS Abstract). 2/

On December 3, 1990, this Board granted a stay of BLM's implementation of its ROD pending resolution of the issues on appeal and granted expedited consideration of this case. The Sierra Club challenges the issuance of the rights-of-way and the proposed exchange and raises numerous technical objections to the FEIS analyses based upon an alleged BLM failure to comply with the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4361 (1988). Our addressing the NEPA questions raised in this case hinges upon resolution of an issue arising under section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (1988), and we will first address appellant's FLPMA challenges.

Appellant asserts that BLM's assumption that it can agree to exchange lands before knowing what lands the Government will receive runs contrary to FLPMA and the Pony Express Resource Management Plan (Plan). It observes that the Plan identifies certain criteria that must be met in exchanges, and avers there is no showing that any of the criteria have been met, and contends that the process of defining values and comparing and making affirmative findings is implicit in the requirements of section 1716(a) of FLPMA, and must be undertaken before a decision to exchange can be made. It insists that the exchange lands must be identified and values and public benefit must be determined and compared before any decision to exchange can be made, and the proposed exchange does not meet these requirements.

2/ The FEIS addresses the Clive site and two alternative sites - the Grassy Mountain Alternative and the Section 23 Alternative - and the No-Action Alternative. The two alternative sites are not the subject of appellant's challenges to BLM's decision.

Sierra Club also contends that the FEIS cannot be used to evaluate an exchange proposal if the lands to be received are not evaluated. It alleges that, without identification of the non-Federal lands, the proposal cannot be found to be in the public interest (Sierra Club Supplemental Statement of Reasons filed Apr. 12, 1991, at 3).

Responding to these arguments BLM maintains that the "identification and tentative approval of these lands for exchange to USPCI does not constitute a final decision that such an exchange will be made" (BLM Answer filed Feb. 6, 1991, at 7). BLM states that, if consummated, such an exchange will be consummated at some time in the future, and might only be partially consummated, depending upon land which USPCI would offer in exchange. It states that the exchange would be consummated only if the offered lands were substantially superior to the west desert lands, which BLM maintains "have little value for resource management as compared to land which might be offered by USPCI." *Id.* BLM relates further "that the reason why this matter has been considered in an EIS as having significant impacts on the quality of the human environment is not because of the land exchange or indeed of the rights-of-way, but because of impacts which would occur because of the USPCI incinerator." *Id.* at 8.

USPCI, citing the ROD, insists that no final decision as to the exchange will be made until the lands targeted for acquisition by BLM are identified, but avers that "[t]o the extent that BLM has preliminarily determined that disposal of the identified public lands would be in the public interest, the record demonstrates that BLM's judgement was far from arbitrary and capricious" (USPCI's Final Brief filed Apr. 29, 1991, at 17). USPCI states that the benefits to be derived from the exchange include the acquisition of high resource lands and the avoidance of liability issues associated with ownership of lands used for transportation of hazardous wastes. *Id.*

[1] The Plan provides that the subject lands are among those that may be disposed of by exchange. Section 206 of FLPMA, 43 U.S.C. § 1716 (1988), authorizing exchanges, provides a critical point of departure and states:

A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired. [Emphasis supplied.]

Exchange is defined by regulation as "[a] conveyance of lands and interests therein from the United States to a person at the same time there is a conveyance of lands and interests therein from the person to the United States." 43 CFR 2200.0-5.

The regulation found at 43 CFR 2200.0-2 requires a finding that if retained in Federal ownership the values and objectives that would be served by the Federal lands or interests to be conveyed must be not more than the values and objectives that would be served by the acquired non-Federal lands and interests. In turn, 43 CFR 2200.1(c)(1) more critically provides that "[a] determination that lands have been found suitable for exchange shall be evidenced by the issuance of a notice of realty action. The notice of realty action shall contain (1) A description of both the Federal and non-Federal lands proposed to be exchanged." (Emphasis supplied.)

An equal value exchange is required. 43 CFR 2201.3(a). However, a money equalization is permitted. 43 CFR 2201.5(c) and 43 CFR 2201.3(a). Thus, appraisals must be undertaken to determine whether the land and interests in lands to be exchanged are of equal value. <sup>3/</sup>

BLM's ROD identifies and makes an indepth study of the Federal lands to be disposed of but identifies no private lands to be acquired by the United States in consideration of the conveyance of Federal lands, but merely provides:

Acquisition may include lands containing Areas of Critical Environmental Concern, threatened and endangered species habitat, riparian areas, wetlands, and important habitat. Although a final determination of public interest will be made at the time the lands targeted for acquisition by BLM are specifically identified, the acquisition of high resource value lands by BLM would be in the public interest. [Emphasis supplied.]

Neither FLPMA nor applicable regulations grant BLM the authority to approve conditionally or otherwise a proposed exchange or a proposed determination as to the suitability of Federal land for disposal by exchange independent of review of the non-Federal lands to be acquired. The plain import of the 43 CFR 2200.1(c) requirement that "a determination that lands have been found suitable for disposal by exchange shall be evidenced by the notice of realty action," which must contain a description of both the

<sup>3/</sup> Determination of appraised fair market value of land sought to be conveyed out of Federal ownership takes into consideration the highest and best use of appraised land and sales of land in the vicinity of the land proposed to be disposed of by exchange. Highest and best use of appraised land is affected by construction of industrial improvements on rights-of-way sought to be disposed of by exchange and the character of the land sold in the vicinity of lands sought to be disposed of by exchange. See Exxon Corp., 106 IBLA 207 (1988).

Federal and non-Federal lands to be exchanged, confirms this lack of authority. BLM has no authority to determine the suitability of Federal lands for disposal by exchange in a vacuum, i.e., independent of review of the non-Federal lands to be acquired. As a necessary part of any decision to approve an exchange, BLM must make the statutory finding under FLPMA that, if retained in Federal ownership the values and objectives that would be served by the Federal lands or interests to be conveyed would be not greater than the values and objectives that would be served by the acquired non-Federal lands and interests. This finding cannot be accomplished without identification and review of the non-Federal land to be acquired. 4/ This being the case, the ROD of September 5, 1990, cannot be construed as a decision to exchange the lands in question. It can only be construed as a statement of policy that the land is suitable for exchange. 5/ The ROD specifically states that the exchange of lands is not being finally determined. It is clear, therefore, that this will be accomplished by some future decision pursuant to the regulatory scheme outlined above. We presently have no jurisdiction to reach the NEPA challenges to the FEIS. 6/ To the extent that the appeal relates to the adequacy of the FEIS' evaluation of the Federal lands subject to exchange, it is dismissed for lack of jurisdiction.

BLM's decision also approved the grant of separate temporary rights-of-way for an access road, a railroad spur, a power transmission line, a well and access road, a water pipeline, and a telephone line (ROD at 1). The ROD details each right-of-way grant, and with respect to the temporary rights-of-way for the access roads and railroad spur line, the decision states that "[n]o transportation of hazardous or toxic materials would be authorized under these short term rights-of-way" (ROD at 7-8). Appellant's challenges to the granting of temporary rights-of-way focus on BLM's compliance with FLPMA. 7/

Sierra Club asserts that BLM has failed to show that the action serves the public interest. Citing 43 U.S.C. § 1761(b)(1) (1988), Sierra Club avers BLM is required to analyze the intended use of the rights-of-way, their effect on competition, and other information necessary to show the grants are in the public interest, and nowhere in the decision is this analysis presented (Sierra Club Supplemental Statement of Reasons filed Apr. 12, 1991, at 10-11). BLM is also faulted for failing to consider the useful life of the facility and the public purposes it serves, and to limit the grant to a reasonable term, as required by 43 U.S.C. § 1761(b)(1) (1988) (Sierra Club Supplemental Statement of Reasons filed Apr. 12, 1991, at 11).

4/ Hence, BLM's finding in the abstract that the acquisition of unspecified high resource value lands by BLM is in the public interest, is not sustainable under the regulatory scheme.

5/ This is a restatement of the previous decision made by BLM pursuant to the 1990 Plan which classifies this land as appropriate for exchange.

6/ This does not foreclose appellant's right to raise those issues in the context of a future land exchange decision.

7/ Appellant does not challenge the granting of the temporary rights-of-way on NEPA grounds.

Sierra Club notes that "BLM assigns a 30[-]year useful life to the project, yet without comment, BLM commits the public land to USPCI in perpetuity, and without any condition to insure that adjacent public land will be protected from hazardous waste contamination." Sierra Club insists that BLM has given no consideration to the possibility that the temporary rights-of-way could become permanent as no definition of "temporary" is given. It asks what condition will protect the public interest if the proposed exchange does not occur. Id.

USPCI responds that BLM required it to submit information related to its use of the rights-of-way, and the FEIS and ROD are based on project information submitted by USPCI (USPCI's Final Brief filed Apr. 29, 1991, at 20). USPCI denies that the rights-of-way have been granted in perpetuity, noting that 43 U.S.C. § 1764(b) (1988) states that "[e]ach right-of-way or permit granted \* \* \* pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project." USPCI urges that "to the extent that [BLM] has already issued rights-of-way for the project, the BLM has complied with the cited provision" (USPCI's Final Brief filed Apr. 29, 1991, at 20). In support of its assertion USPCI notes that the temporary access road right-of-way was granted for a specified term and USPCI has applied for a second temporary access road right-of-way pending completion of a land exchange. Should the land exchange not be consummated USPCI maintains that BLM has not committed itself to a right-of-way in perpetuity. Id. Commenting on the powerline right-of-way, USPCI notes that it is limited in term and avers that BLM has acted consistent with FLPMA section 504(b), 43 U.S.C. § 1764(b) (1988) (USPCI's Final Brief filed Apr. 29, 1991, at 19-21).

43 U.S.C. § 1764(b) (1988) provides:

Each right-of-way or permit granted, issued or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project. In determining the duration of a right-of-way the Secretary concerned shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal.

[2] We find no merit in Sierra Club's allegation that BLM has not addressed the intended purpose of the temporary rights-of-way or whether granting the rights-of-way is in the public interest. The FEIS and ROD sufficiently identify the issues surrounding whether granting the temporary rights-of-way is in the public interest given the intended use of the rights-of-way. BLM does not propose to grant a temporary right-of-way for the access road in perpetuity and has limited the proposed right-of-way for the temporary access road to 6 months. Concerning the term and purpose of the temporary access road right-of-way, the ROD contemplates a temporary access road with a term limited to the period in which the USPCI facility will be constructed pending consummation of a land exchange with BLM.

The ROD also states at Section III B.1.:

The temporary right-of-way affects Sections 19 and 20, T. 1 S., R. 11 W., SLM. No transportation of hazardous or toxic materials would be authorized under this short term right-of-way. This road is approximately 2.5 miles in length.

\* \* \* \* \*

RATIONALE: It will be necessary for USPCI to construct a temporary access road to the plant site to allow for facility construction. It has been determined that the construction of the access road would not significantly impact the environment. Because of potential liability concerns, BLM will not allow the transportation of hazardous or toxic materials across rights-of-way granted to private entities. It is BLM's intent to consummate a land exchange involving this public land prior to the operation of the Clive facility, and this temporary access road would not be used for the transportation of hazardous or toxic waste. Construction would be in accordance with environmental and other conditions that are stipulated in the EIS and right-of-way grant.

The proposed temporary access road right-of-way document prohibits the transportation of hazardous materials in conjunction with the operational phase of the facility, including any test burns. In addition to the condition cited above, a copy of a proposed right-of-way grant for the access road reveals that it provides for a nonrenewable 6-month term and is subject to 6 general and 12 site-specific stipulations designed to protect cultural and/or paleontological resources and survey monuments and ensure reclamation of disturbed lands. The remaining stipulations prohibit compaction of soils, limit clearing and grading within the right-of-way, and grant BLM significant authority to regulate activities occurring within the right-of-way. For example, USPCI is authorized to construct, operate, and maintain the road only in strict conformity with a plan of development submitted October 3 and amended November 6, 1990, and after a preconstruction conference. The conditions referenced are specifically designed to permit minimal surface disturbance to the lands embraced by the right-of-way and adjacent lands and are designed to guarantee reclamation of the lands embraced by the right-of-way at the termination of the right-of-way.

The proposed temporary railroad spur line is similarly limited in duration pending the consummation of the land exchange and is subject to the stipulation banning transportation of hazardous and toxic wastes.

Prohibiting the transportation of hazardous and toxic substances over public lands is fully consistent with the Plan. The Plan provides: "BLM will not authorize placement or processing of hazardous wastes on public lands" (Plan at 29). BLM's policy is "that no further authorizations will be made for the treatment, storage or disposal of hazardous waste on public lands. Public lands may be made available for such uses but only after such lands are transferred from public ownership." *Id.* Sierra Club has

not shown that the granting of the temporary access road right-of-way and temporary spur right-of-way fail to comport with the Plan.

Assuming the exchange is consummated, BLM has given consideration to the useful life of the facility and the public purposes it serves, and has limited the grants for the transmission line, powerline, and water well rights-of-way to a reasonable term as required by 43 U.S.C. § 1761(b)(1) (1988). The record discloses that BLM proposes to limit the powerline and transmission line right-of-way to 30 years, the useful life of the proposed incinerator. Nonetheless, neither the ROD, FEIS, nor the record disclose whether the powerline, transmission line, and waterline rights-of-way terminate if the land exchange is not consummated and if they do, when. To the extent that BLM failed to provide for this contingency in the proposed rights-of-way, the grant of those rights-of-way fails to comport with 43 U.S.C. § 1764(b) (1988) and 43 CFR 2801.1-1(h). BLM's decision to grant the powerline, transmission line, and waterline rights-of-ways is vacated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed in part, vacated in part, and remanded for further action consistent with this opinion.

R. W. Mullen  
Administrative Judge

I concur:

James L. Byrnes  
Administrative Judge



## ADMINISTRATIVE JUDGE FRAZIER DISSENTING:

The "Decision Record Sheet" signed by the Pony Express Resource Area Manager, on behalf of the Salt Lake District Manager, and by the Utah State Director, states:

Following the review of the Environmental Impact Statement (EIS) and public comments of record, it is deemed in the public interest to approve the Clive site in Tooele County, Utah for the location of an incineration facility.

We hereby approve for issuance the required authorizations for use of the public lands necessary for the construction of the USPCI Clive Incineration Facility located at the Clive site in Tooele County, Utah. These land use authorizations include right-of-way grants for temporary access roads and a temporary railroad spur; and right-of-way grants for a power transmission line, a well and access road, a water pipeline, and a telephone line. No transportation of hazardous or toxic materials will be allowed under the temporary access rights-of-way. A proposed land exchange would allow for the transfer out of federal ownership of all public lands containing private haul roads and railroad spurs. A final decision on a proposed land exchange will be made pending a Supplemental Environmental Assessment addressing the lands to be acquired by BLM.

There is no dispute that the proposed land exchange decision was not processed and finalized in accordance with section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (1988), and the implementing regulations; however, BLM has made a decision with respect to the course of action it will follow which will allow USPCI to proceed with its project.

USPCI proposes to construct the Clive Incineration Facility for the transfer, storage, and incineration of hazardous, toxic, non-hazardous, and medical wastes on its land located in sec. 36, T. 1 S., R. 11 W., in Tooele County, Utah. In connection with this project, USPCI applied for rights-of-way over surrounding public lands during the construction phase of its project, and to obtain these public lands by exchange. This project cannot proceed without the approval of BLM. The National Environmental Policy Act (NEPA) requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1988). As stated in the "Introduction" of the September 5, 1990, Record of Decision (ROD), BLM determined that the granting of the rights-of-way and possible consummation of a land exchange would constitute a "Major Federal Action" under NEPA. Accordingly, it proceeded to prepare an EIS for the project.

In State of Wyoming Game & Fish Commission, 91 IBLA 364 (1988), the Board discussed NEPA and the obligation to consider the environmental consequences of a decision. We said at page 367:

The National Environmental Policy Act (NEPA) is essentially procedural rather than substantive. See Strycker's Bay Neighborhood Council v. Karlin, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); In re Otter Slide Timber Sale, 75 IBLA 380 (1983). NEPA proceeds from a recognition that it is inevitable that Government actions will sometimes occur which may have significant negative impacts on certain environmental values. What is critical is that the Government officials determining whether those actions should go forward have a full and complete grasp of the possible consequences of the activity in order that they may take steps to ameliorate adverse impacts to the extent possible, and, if certain impacts cannot be avoided, decide the advisability of proceeding and thereby accepting such impacts.

The fact that NEPA is essentially procedural, however, does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision, adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent [sic] upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA.

Appellant contends that the decision is improper because approval of the proposed land exchange and the rights-of-way failed to comply with the applicable provisions of FLPMA and the implementing regulations. It also challenges the adequacy of the EIS to support the decision to approve the Clive site for location of the USPCI incineration facility.

The majority does not find it necessary to consider the adequacy of the EIS, considering only the substantive issues challenging the issuance of the rights-of-way under FLPMA.

I disagree with the majority's approach to resolve this appeal and respectfully dissent.

The January 1990 Record of Decision for the Pony Express Resource Management Plan (Plan ROD) identified the lands sought by USPCI as available for exchange. The Plan ROD, under "Lands Program" at "Decision 3," listed five criteria to be accomplished for the land to be considered for exchange and included a rationale for the decision. <sup>1/</sup> In the EIS, BLM

---

<sup>1/</sup> "Decision 3" states:

"The remaining public lands (1,581,962 acres) in the Pony Express Resource Area (including revoked withdrawals returned to BLM administration) are available for exchange.

"In order to be considered, exchanges of public land in the Pony Express Resource Area must accomplish one or more of the following criteria:

determined that the land exchange proposal would accomplish criteria 2 and 5. Pursuant to 43 CFR 2200.1(a), public lands may be disposed of by exchange only if their disposal is in conformance with the land use planning provisions contained in 43 CFR Subpart 1601. The lands sought by USPCI have been properly identified as available for disposal by exchange. 2/

The ROD states that the EIS was the basis for the BLM decision. Under NEPA, an agency must have an EIS prepared by "the time at which it makes a recommendation or report on a proposal for federal action." Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320 (1975) (emphasis in original); accord Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976); National Wildlife Federation v. FERC, 912 F.2d 1471, 1477 (D.C. Cir. 1990). A final decision by BLM on the land exchange proposal is not necessary to trigger the preparation of an EIS. 3/ The ROD approved the preferred alternative which

---

"(1) Increase public ownership within those areas of public land which are not available for disposal or any other transfer from Federal ownership and BLM management (see Table 4 and Figure 2).

"(2) Result in a net gain of significant resource values on public land such as important wildlife habitat, cultural sites, riparian zones, live water, and threatened and endangered species.

"(3) Improve the accessibility of the public lands.

"(4) Contribute toward more efficient management of public lands through consolidation of ownership.

"(5) Remove from Federal ownership public lands which have lost all significant public values due to on-site or adjacent uses.

"Land exchanges will continue to be analyzed on a case-by-case basis. Resource values may be incorporated into the fair market value of the land. "Rationale

"Exchanges would allow the readjustment of ownership patterns without a net loss of Federal ownership or natural resource values if they are accomplished under the criteria listed above. Current BLM policy favors large exchanges that result in a significant benefit to the public." (Plan ROD at 3-4). 2/ The record indicates that BLM and USPCI have discussed and have an understanding that BLM will locate and identify private lands which contain desirable resources, and USPCI will purchase these lands and offer them in exchange for the public lands surrounding its incinerator project. Until an exchange is finalized, BLM will grant USPCI rights-of-way over these for construction. Consistent with the Plan discussion, "Hazardous Waste Management" at 29, no transfer of hazardous and toxic materials may occur over these lands until they have transferred.

3/ Whether the lands to be offered in exchange for the public lands are identified at this stage is not critical. The public lands sought are located in an area zoned for hazardous waste disposal. BLM is the Secretary's representative charged with the responsibility for making land-management decisions. Nothing in the record suggests that in identifying the lands acceptable for exchange, BLM would not properly discharge its

includes a land exchange. Thus, in the first instance, preparation of an EIS for the project was essential to enable BLM to decide whether it should grant its approval for the facility. NEPA demands that a decisionmaker consider all significant environmental impacts before choosing a course of action; the decisionmaker is compelled to follow NEPA's evaluative process before acting. Sierra Club v. Marsh, 872 F.2d 497, 502 (1st Cir. 1989). Indeed, NEPA requires that the evaluation of a project's environmental consequences take place in the project's planning process. California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).

Before BLM could make any decision on the USPCI proposal, an investigation into, and an analysis of, the environmental consequences of the Clive Incineration Facility were necessary. Thus, even assuming the land exchange were not at issue, NEPA would mandate preparation of an EIS for BLM to make a decision on the requests for the rights-of-way. The rights-of-way allow USPCI to proceed with the construction phase of its facility. Federal action within NEPA section 102(2)(c) includes not only action undertaken by a Federal agency itself, but also any action permitted or approved by the agency. Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1244 (D.C. Cir. 1980). If construction of the facility can only proceed if BLM issues the requested rights-of-way, then NEPA requires preparation of an EIS.

With respect to the majority opinion's review of the rights-of-way decision, it finds the temporary access road and temporary railroad spur rights-of-way were properly issued under FLPMA, and finds the powerline, transmission line, and waterline rights-of-way were not. These conclusions do not address the issue of whether the EIS is adequate to support the decision to approve the project.

BLM says it has taken a hard look at the project, and that the EIS is adequate. The adequacy of the EIS depends on whether BLM followed procedures required by law in its preparation. See North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1540 (11th Cir. 1990).

Appellant challenges the adequacy of the EIS to support the BLM decision to approve the proposed alternative. We should address the merits of this appeal and make a finding as to whether the EIS, as prepared, is sufficient.

Gail M. Frazier  
Administrative Judge

---

duties. BLM has stated that the exchange will be considered in a separate environmental document, and the public will have an opportunity to review and challenge the decision contained therein.

